United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2161

To be Argued by
MILTON S. GOULD

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 74-2161

RONSON CORPORATION,
Plaintiff-Appellant,

v.

LIQUIFIN AKTIENGESELLSCHAFT,
Defendant-Appellee,

and

LIQUIGAS S.p.A., LIQUIMPORTEX AKTIENGESELLSCHAFT, THE FIRST NATIONAL BANK OF WASHINGTON, RAFFAELE URSINI, PHILIP MARFUGGI, DANIEL A. PORCO and MICHELE SINDONA,
Defendants,

LOUIS V. ARONSON II, JEROME J. BLUMBERG, GILBERT MACKAY, MORTON A. SIEGLER, MORRILL J. COLE, JUSTIN P. WALDER, A. LESTER GRANET, ROBERT B. WRIGHT, and GEORGESON & Co.,
Counterclaim-Defendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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Counterclaim-Defendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

Statement

Plaintiff-Appellant Ronson Corporation ("Ronson") submits this brief in support of its appeal from an order made by the United States District Court (Hon. Charles H. Tenney U.S.D.J.) on August 21, 1974 granting the motion of

Defendant-Appellee Liquifin Aktiengesellschaft ("Liquifin") for an order (a) enjoining Ronson and Inspectors John P. Mead and Lawrence Bloom from publishing as the final report of the results of the Ronson annual stockholders' meeting an "Inspectors' Report" dated July 8, 1974 and (b) compelling Ronson and the Inspectors to issue a final report which reflect Liquifin's instructions, made on July 5, 1974, that the shares of its nominee, Finbow & Co. ("Finbow") be voted so as to ensure the election of Oreste Marfuggi and Donald J. Zoeller, rather than James C. Malone and John R. Markley, to the Board of Directors of Ronson (219a).*

Statement of Issues Presented for Review

1. Does an agreement that sets the time for closing of the polls and provides that after the polls are closed "no further voting shall be permitted and no further proxies or ballots shall be accepted or considered by the Inspectors" preclude the withdrawal and re-voting of votes cast?

2. May a stockholder, as a matter of law, change (not merely correct) his ballot after some, but not all, of the shareholders know the election results, provided only that such change is made prior to the formal announcement of the election results, even if other shareholders do not have like opportunity to change their ballot?

3. Do proxy materials disclosing only that if certain nominees of the solicitor shall be "unavailable to serve," the proxy agents shall vote their shares for other nominees of the solicitor, fairly advise the shareholders that certain nominees are willing to serve only if *all* the nominees are elected?

*Numbers in parentheses followed by "a" refer to pages of the Joint Appendix.

4. Were the proxy rules violated by Liquifin when it stated in its proxy materials that the proxies solicited by it would be voted for all nine of its nominees, but then in fact caused its shares to be voted so as to favor two specific Liquifin nominees to the exclusion of all others?

5. Were Messrs. Markley and Malone "unavailable to serve" within the meaning of that phrase as used in Liquifin's proxy materials?

6. Is it consistent with due process to allow the effect of the vote of a shareholder, cast in person at the shareholders meeting, to be nullified by subsequent court action on motion by another shareholder without notice to the affected shareholder?

7. Is it professional impropriety or conflict of interest for an attorney, whose firm represents an entity which is an adversary of a corporation in pending litigation, to sit on that corporation's board of directors?

Nature of the Case

The present action was commenced on June 7, 1974, when Ronson filed the summons and complaint herein (4a). The complaint contains three counts. The first count is based upon defendants' breach of fiduciary duty and waste of corporate assets by taking actions which jeopardized and continue to jeopardize the continuation of Ronson's defense business, its Helicopter business, its radio transmission licenses, its $22 million indebtedness to the Prudential Insurance Company of America and its short-term bank lines of credit (7a). The second count is based upon violations by defendants of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 and Rules 14a-9 and 14a-11 promulgated thereunder by making false and mis-

leading statements in a proxy statement and letter to stockholders issued by defendants on or about June 3, 1974, in subsequent letters sent by Liquifin and in 14B Statements filed by certain defendants in May 1974 (16a). The third count is based upon violations by defendants of Sections 10(b), 13(d), 14(d), 14(e) and 20(a) of the Securities Exchange Act of 1934 and Rules 10b-5 and 10b-13 promulgated thereunder by purchasing Ronson common stock in the open market in the names of persons who were nominees for defendants or persons with whom defendants had arranged to "park" or "warehouse" the Ronson common stock being purchase (26a). Ronson seeks preliminary and permanent injunctive relief, damages and costs (32a).

On or about June 10, 1974, defendants Liquifin, Liquigas, Liquimportex and Marfuggi filed an answer wherein they denied certain material allegations of the complaint and interposed counterclaims against Ronson, and the members of its Board of Directors and certain others (herein "counterclaim defendants") based upon alleged violations by plaintiff and counterclaim defendants of Sections 10(b), 14(a) and 14(e) of the Securities Exchange Act of 1934 by allegedly making false and misleading statements in certain letters, proxy material, press releases and other communications issued by Ronson (48a). The counterclaiming defendants also sought preliminary and permanent injunctive relief, damages and costs (65a).

On or about July 1, 1974, Ronson and the other counterclaim defendants served their reply wherein they denied the material allegations and asserted as defenses that the counterclaim failed to state a claim upon which relief may be granted (76a), that the Court lacked jurisdiction over the person of the counterclaiming defendants (76a), and that as to counterclaim defendant Georgeson & Co. process was insufficient (77a).

Proceedings Below and in this Court

After the complaint and answer herein were filed, and on June 13, 1974 an election was held for the Ronson Board of Directors (226a). Prior thereto, as described in detail hereinafter, Ronson and Liquifin entered into a "ground rules agreement" with accompanying presumptions which provided, *inter alia* that the election would be supervised by two employees of the Corporation Trust Company of New York who would determine the validity and effect of proxies and ballots and thereafter count the proxies and ballots and issue a final certificate setting forth the results of the election (86a-88a). On July 8, the Inspectors reported the results of the election, namely that seven Ronson nominees (Messrs. Aronson, Blumberg, Granet, MacKay, Siegler, Walder and Cole) and two Liquifin nominees (Messrs. Malone and Markley) had been elected.

Thereupon, on the following day, July 9, 1974, Liquifin made an oral motion in open court for an order (a) enjoining Ronson and the Inspectors from publishing as the final report of the results of the Ronson stockholders' meeting the Inspectors' Report dated July 8, 1974 and (b) compelling Ronson and the Inspectors to issue a final report which reflects Liquifin's instructions, made on July 5, 1974, that the shares of its nominee, Finbow be voted so as to ensure the election of Oreste Marfuggi and Donald J. Zoeller, rather than James C. Malone and John R. Markley, to the Board of Directors of Ronson (198a).

On August 21, the Court below rendered a memorandum opinion and order granting Liquifin's motion (206a) and on August 29, denied Ronson's motion for a stay pending appeal. Thereafter, on September 10, 1974 this Court (Hon. Murray I. Gurfein, C.J. and J. Joseph Smith, C.J.) granted Ronson's motion for a stay.

Statement of the Facts

There are nine seats on the Ronson's Board of Directors (131a). Prior to the election scheduled for June 13, 1974, Ronson management determined to propose a slate of only seven candidates (131a). Two places were deliberately left open, in view of the fact that Liquifin owned approximately 36.4% of the outstanding stock of Ronson (130a, 147a). By leaving two places open, Ronson management made it possible for two Liquifin nominees to be elected to the board by the stockholders, even if Liquifin's attempt to elect some or all of the remaining directors was unsuccessful. Thereafter, Liquifin announced that it would solicit the proxies of Ronson's shareholders and it further announced the identity of its candidates for Ronson's Board of Directors (which, unlike Ronson, consisted of a nine-man slate) (117a).

On the day of the election, June 13, 1974, Ronson and Liquifin entered into an agreement setting forth the ground rules and accompanying presumptions for conducting the election (86a).

The proxy contest for control of Ronson was won overwhelmingly by Ronson management. Five of the seven management nominees received 2,255,525 votes and the other two management nominees received 2,255,387 votes (109a). Seven of the nine Liquifin nominees each received 1,811,447 votes (109a). Two of the Liquifin nominees, James C. Malone and John R. Markley, received slightly more, 1,811,585 votes each (109a). The additional 138 votes were cast by two public shareholders of Ronson, Mr. and Mrs. Hamblen, who were not associated with management or with Liquifin (121a). Thus, the votes cast were sufficient to elect the entire management slate plus Messrs. Malone

and Markley. The Inspectors' Report of July 8, 1974, sets forth the above figures (109a).

On June 20, 1974 the Inspectors reported their "unofficial tally" of the results to both sides (150a). Counsel for both sides then agreed upon a schedule for further events. Pursuant to the schedule agreed upon the Inspectors heard challenges to various proxies and ballots by both sides on July 1, 1974, and announced their rulings on July 2, 1974 (102a).

The schedule agreed upon between counsel called for the issuance of the final report and certificate of the Inspectors on July 8, 1974 (102a).

On July 5, 1974 *after* the final results of the vote had been disclosed by the Inspectors to Liquifin and Ronson (though not yet publicly announced), a telegram signed with the name of Philip Marfuggi was delivered to the Inspectors. The telegram purported to instruct the Inspectors that the Liquifin shares were to be "voted in number and manner so as to ensure that nominees Oreste Marfuggi and Donald J. Zoeller shall each receive the vote of a larger number of total shares" than any of the other Liquifin nominees (107a).

The Inspectors did not comply with this purported instruction because in their discretionary interpretation of the ground rules and accompanying presumptions, Liquifin was prohibited from changing its vote (154a). They issued their report on July 8, 1974, setting forth the results of the voting recited above.

The "ground rules" agreement, made shortly before the stockholders' meeting was convened on June 13, 1974, provided in Paragraph "5",

> "The polls shall be opened immediately after completion of the nominations and the introduction of the

proposal on the ratification of the appointment of Auditors for the Company and shall remain open until 4:00 P.M. Newark Time on June 13, 1974, or such earlier time as the discussion on matters to be voted upon has been concluded, and shall thereupon be closed; and *thereafter no further voting shall be permitted and no further proxies or ballots shall be accepted or considered by the Inspectors* except as provided in the Presumptions." (88a; Emphasis added).

Paragraph "6" of the agreement provided,

> "*Prior to the closing of the polls, proxies, ballots* and evidence *must be delivered to the Inspectors* at the Ronson Annual Meeting at the Robert Treat Hotel." (88a; Emphasis added).

The Presumptions referred to in Paragraph "5" were attached to the agreement. The only arguably pertinent section of the Presumptions was a provision to the effect that the Inspectors were to obtain a clarification from a broker or nominee in any case where a proxy submitted by a nominee did not specify a designated number of shares or contained in the Inspectors' opinion any other inconsistency or ambiguity (98a).

Section "16" of the Presumptions gave the Inspectors the express "power to interpret and construe these Presumptions" (97a).

In its proxy statement, Liquifin had represented that each of its nominees, including Messrs. Malone and Markley

> ". . . has consented to serve as a director if elected, and Liquifin does not contemplate that any of the candidates will be unavailable for election as director." (125a).

Liquifin incorrectly asserted below that Ronson had made a commitment to permit *Liquifin* to "select" the particular Liquifin nominees to occupy the two seats on the Board, in the event the entire Liquifin slate was defeated (81a). Judge Tenney, recognizing the incorrectness of this assertion, said (214a) "the Court does not believe that Ronson ever promised Liquifin that it could select the individuals for these seats. . . ."

The Ronson management proxy statement said that at the stockholders' meeting, "the *stockholders will elect* a Board of *nine* Directors" but that proxies given to the management would only be "voted for the seven persons named below" and would "not be voted for the two remaining seats . . ." (122a; Emphasis added).

At the stockholders' meeting on June 13, 1974 Ronson's president stated,

> "We recognize the Liquifin/Liquigas through Finbow, their nominee, have approximately 36 per cent of the Ronson stock. Our Board believes that we must recognize their interests. This is a very large stockholding. We think it's fair to give them the opportunity to have—this is for them, *for the stockholders.* I shouldn't say for them, *it's for the stockholders, to decide whether two of their nominees may serve on the Ronson Board filling out the slate of seven Ronson Directors,* again on the belief that the stockholders will vote for our slate of seven Directors." (123a; Emphasis added).

Ronson's counsel also made a statement on this subject at the meeting. He said:

> "In a nine person Board of Directors, the management slate will occupy seven seats. Presumably Liquifin/Liquigas has cast its vote and its proxy, if any, for its slate of nine, one would expect, if the

> Inspectors of Election act the way we expect they will, that *the two highest Liquifin/Liquigas nominees will occupy the two seats.*" (123a; Emphasis added).

At the time of the filing of the management proxy soliciting material, the staff of the Securities and Exchange Commission took the position that any undisclosed agreement between Ronson and Liquifin as to the manner in which the two seats would be filled would create a violation of the proxy rules. Ronson's counsel assured the staff that there was no such agreement.*

Liquifin's shares standing in the name of Finbow, a nominee, were all voted at the meeting in favor of all nine of Liquifin's nominees for director. The Finbow proxy gave the proxy holders authority to vote "all the shares" which Finbow would be entitled to vote if personally present (156a). It permitted such shares to be voted for "the election of 9 Directors" (156a). It did not give the proxy holders authority or discretion to vote less than "all" the shares for any one or more of the Liquifin nominees.

The Liquifin proxy statement said (123a),

> "The proxies solicited by Liquifin will be voted for *all* the candidates named below."

Liquifin's proxies were voted at the June 13, 1974 meeting exactly in accordance with the above quoted representation from its proxy statement. The Liquifin proxy holders submitted a ballot at the meeting on June 13, 1974 stating that the Liquifin shares were being voted for "All 9

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* In the Court below, Liquifin also contended that the Inspectors of Election had made a secret agreement with Liquifin permitting it to change its vote after the polls were closed (81a). The existence of such an agreement was flatly denied by both Inspectors of Election (148a, 157a) and Judge Tenney specifically refused to recognize the purported agreement (217a; footnote 4).

Nominees" on the Liquifin slate (155a). In the space on the ballot for writing the number of shares being voted, the proxy holders wrote, "per proxies filed." (155a).

The stockholders' meeting convened on June 13, 1974 at about 2:30 p.m. Nominations were made, the polls were opened, proxies and ballots were received by the Inspectors, discussion was had, and then the polls were declared closed in accordance with the ground rules and accompanying presumptions referred to above. The Inspectors impounded the ballots and proxies and took them to a hotel suite in New York for counting (150a).

On July 9, 1974, Liquifin, in open court before Judge Tenney, moved to enjoin the Inspectors and Ronson management from publishing the July 8, 1974 report and to compel the Inspectors to issue a final report reflecting the July 5, 1974 instructions (198a). At the same time, Liquifin's attorneys announced that Messrs. Malone and Markley ". . . would prefer not to serve under circumstances where they are only a minority on a Ronson-controlled board" (182a) and subsequently advised by telegram and letter that they would serve on Ronson's board as minority directors if Donald Zoeller or Oreste Marfuggi were not allowed to do so (228a).

On August 21, 1974, Judge Tenney, in a memorandum opinion, granted Liquifin the relief requested in its motion (206a). Ronson here appeals from that ruling.

ARGUMENT

POINT I

The District Court should have denied Liquifin's motion for injunctive relief (A) because there was no abuse of discretion by the Inspectors of Election (B) because the change came nearly one month after the polls had closed and no inadvertent ministerial error in voting was claimed and (C) because the "Ground Rules" agreement precluded any attempt to change any vote after the polls were closed.

A. The Court Below Did Not and Could Not Find an Abuse of Discretion by the Inspectors of Election; Accordingly, Under Established Principles of Corporate Law, Their Refusal to Accept a Changed Ballot is Binding on the Parties.

Under the law of New Jersey,* inspectors of election are given responsibility to perform a great many tasks, and the broadest discretion in the performance of their functions. They are not mere ministerial officers.

The New Jersey Business Corporation Act, N.J.S.A. 14A:5-26, provides:

> "The inspectors shall determine the number of shares outstanding and the voting power of each, the shares represented at the meeting, the existence of a quorum, *the validity and effect of proxies,* and shall receive votes or consents, *hear and determine all challenges and questions arising in connection with the right to vote,* count and tabulate all votes or consents, determine the result, and do such acts as are proper to conduct the election or vote with fairness to all shareholders. If there are three or more

* Under the "ground rules" agreement (¶15), the law of New Jersey governs (92a).

> inspectors, the act of a majority shall govern. On request of the person presiding at the meeting or any shareholder entitled to vote thereat, the inspectors shall make a report in writing of any challenge, question or matter determined by them. *Any report made by them shall be prima facie evidence of the facts therein stated*, and such report shall be filed with the minutes of the meeting." (Emphasis added).

New York has enacted a virtually identical provision, Section 611 of the Business Corporation Law. It has been said of the New York statute that:

> "It is clear that by virtue of this enactment inspectors of election are no longer relegated to purely ministerial duties."
>
> Aranow and Einhorn, *Proxy Contests for Corporate Control* (2d ed. 1968), p. 408.

Neither Ronson, Liquifin nor the District Court has found any New Jersey cases dealing with the precise question presented here. However, the general discretion of Inspectors is not new to the law of corporate elections.

In *In The Matter of Chenango County Mutual Insurance Co.*, 19 Wend. 635 (N.Y. 1839), the Court, in upholding the discretion of the Inspectors in closing the polls after all shareholders had had ample opportunity to cast their ballots ruled (p. 637):

> "I observe that no time is specified by law within which the polls must be kept open; the duration of the time must, therefore be left to the sound discretion of the inspectors . . . As to the due exercise of discretion in this case, the affidavits submitted on this motion are considerably in conflict, *but it is impossible for me to say, giving due weight to all of them, that there was an abuse of discretion.* The depositions of the inspectors themselves are very full and

> explicit, and in respect to their conduct most seriously impeached, namely, as to the closing of the polls, they are strongly confirmed by the evidence of others; so much so that I do not feel myself warranted in subjecting the company upon this ground to the trouble and expense of a new election; and especially so when I see from the papers submitted that if a further continuance of the poll has been granted, the result probably would not have been varied, except, perhaps as to one candidate." (Emphasis added).

See also 19 *Corpus Juris Secundum, "Corporations"* § 720, p. 48:

> "Where no time is specified by law within which the poll of an election of directors must be held, the duration of time must be left to the sound discretion of the inspectors, . . ."

Here, Liquifin not only had ample opportunity to vote its shares; it actually voted them, and voted them precisely as it intended to and as it had represented it would in its proxy statement. See also *Prince* v. *Albin,* 200 N.Y.S. 2d 843, 845 (Sup. Ct., N. Y. Co., 1960).

Even before the enactment of the New Jersey statute above quoted, the discretion of Inspectors of election appears to have been recognized as a matter of New Jersey law. As the Court said in *Elevator Supplies Co.* v. *Wylde,* 150 A. 347 (N. J. Ct. of Chancery, 1930) (p. 349):

> "The defendant's right to vote the number of shares of stock which she claims she is entitled to vote is for determination by the inspectors of election at the stockholders' meeting."

In the case at bar, the closing of the polls was not left to the Inspectors (91a). The polls were closed on June 13,

1974, after all stockholders had had an opportunity to file their proxies or cast their ballots. The polls were closed, in fact, pursuant to a written agreement, signed by Liquifin's counsel, specifically providing for the closing of the polls at 4:00 P.M. on June 13, 1974 or at such earlier time as discussion on the matters to be voted upon might be concluded (91a). Liquifin did not attempt to change its vote until July 5, 1974, nearly a month *after* the polls had officially been closed.

It is respectfully urged that even if there had been no agreement prohibiting further voting after the polls were closed, the Inspectors would have been well within their rights, in view of the discretion given them, in rejecting Liquifin's attempt to amend its ballot.

B. There Was No Inadvertent Ministerial Error to be Corrected; Liquifin Attempted to Change its Ballot.

Liquifin asserted below that the law gives it the right to change its vote for any reason at any time before the official announcement of the results. The District Court, recognizing that none of the cases cited by Liquifin was in point on the issue of whether the law allowed it to change its vote, relied solely on statements in two treatises (212a). Indeed, every case cited in the District Court's opinion involved situations where a stockholder had been permitted to alter his vote because his original vote had failed, as a result of inadvertent "ministerial error," to accurately reflect the stockholder's intention at the time of his original vote.* Accordingly, even the District Court noted that "a

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* *Washington State Labor Counsel* v. *Federated American Insurance Co.*, 474 P.2d 98 (Sup. Ct., Wash. 1970) (delay because company officials had to perform certain other duties in connection with the meeting, and did not have an opportunity to cast the company's

case could arguably be made that, in practice, the courts have restricted this rule [permitting acceptance of ballots after the polls have closed] solely to this situation in which the shareholder seeks to correct some inadvertent 'ministerial' error and the applicable law, corporate by-laws or pre-election agreement do not speak to the contrary." (213a). We respectfully submit that, as is shown by the cases cited by the Court itself, no case ever held otherwise prior to the decision of Judge Tenney appealed from herein.

In the case at bar, the facts are clear: (1) that there was no "inadvertent 'ministerial' error"; (2) that neither the applicable law, corporate by-laws or pre-election agreement permitted any shareholder to change his vote after the polls were closed; and (3) that Liquifin attempted to change its vote not minutes or hours, but 22 days after the polls had been closed.

It should be noted that Liquifin has never claimed to have made any error at all, be it ministerial, clerical or otherwise. It has not claimed that any part of the manner in which it cast its votes was inadvertent.

In the space on the ballot for designating the number of shares being voted, Liquifin wrote "per proxies filed" (155a). It stated on the ballot that all shares being thus

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proxies); *Young* v. *Jeblett*, 213 App. Div. 744, 211 N.Y.S. 61 (4th Dep't 1925) (inadvertent failure to submit one of two envelopes containing proxies); *Zierath Combination Drill Co.* v. *Croake*, 131 P. 335 (Dist. Ct. App. Cal. 1913) (ministerial mistake of stockholder in casting his ballot); *State ex rel. Dunbar* v. *Hohmann*, 248 S.W. 2d 49 (Ap. Mo. 1952) (delivery of ballot 30 minutes after the polls had closed, which delay resulted from checking of proxies by the Inspectors of Election); *Zachary* v. *Milin*, 293 N.W. 770 (Sup. Ct. Mich. 1940) (prompt resubmission of ballots by shareholders who had initially forgotten to cumulate their votes); *State rel. David* v. *Dailey*, 158 P.2d 330 (Sup. Ct. Wash. 1945) (ministerial error preventing votes from being cast until just after polls were closed).

voted were to be counted in favor of "All 9 Nominees" on the Liquifin slate (155a).

It is submitted that this act was scarcely inadvertent. It was obviously done deliberately, for it is a well-recognized way of instructing Inspectors as to how votes are to be counted. As is pointed out in *Aranow* and *Einhorn, supra,*

> "If the procedure recommended in the next section is followed, each soliciting group will cast only one ballot, marked *'per proxies filed'*, so that the total number of ballots cast will be very few." (p. 367; Emphasis added).

C. The Change Permitted By the Court Below Was Precluded By the "Ground Rules Agreement."

Paragraph "5" of the "ground rules" agreement provided, with an exception not relevant here, that the polls would close on June 13, 1974, and that

> ". . . thereafter no further voting shall be permitted and no further proxies or ballots shall be accepted or considered by the Inspectors . . ." (88a).

Under Paragraph "6" of the agreement, all proxies, ballots and supporting evidence were required to be delivered to the Inspectors "[p]rior to the closing of the polls . . ." (88a).

Liquifin's attempt to change its vote on July 5, 1974 was squarely defied these provisions. We submit that the Inspectors had no choice but to reject the attempt and that there was no basis for the Court to overrule the agreement of the parties.

The District Court held that the phrase "further voting" in the paragraph quoted above referred solely to "the filing of additional ballots" (212a). We urge that such an interpretation is insupportable and would create inequities if

not havoc. The provision prohibiting the Inspectors from accepting "further proxies or ballots" (88a) is rendered meaningless if, as the Court held, the Inspectors were required to accept instructions to amend proxies or ballots. Under such an interpretation, a shareholder could change his vote at any time provided that he did so, not by filing another proxy, but by sending a telegram saying he wanted to change his previously filed proxy.

The effect of this holding is that long after all ballots have been regularly voted and after the results are known to certain stockholders, the stockholders privy to that information are given an advantage not had by any other stockholders and, of course, other stockholders may then wish to change their ballots in the light of the new information. The necessary finality achieved by closing of the polls is thus totally vitiated. Indeed, proxy solicitation itself would continue the see-saw scramble with both sides in court trying to delay the "formal announcement" of the ultimate result.

What happened was that on July 5 Liquifin sought to change its ballot by its telegram of that date (107a). This was intended to result in Liquifin's votes being changed so as to subtract 1000 votes from Malone and Markley and all the other nominees of Liquifin except Zoeller and Marfuggi. In substance by this change, if we are to take Judge Tenney's decision to a logical extreme, the Ronson directors and other shareholders then had the same right to change their outstanding ballots by instructing the Inspectors to subtract 100*1* votes from some Ronson nominee and add 100*1* votes for Malone and Markley. Then maybe Liquifin would come back and instruct the Inspectors to shift 100*2* votes and so on in some kind of undisciplined auction until one or the other had run out of available "free" votes. How long such a process would take, what kind of chaos

it would create and what the impact would be on normal orderly corporate disciplines it is impossible to predict. To what extent other shareholders could then join in the free-for-all and to what extent re-solicitation would be needed no one can tell. Certainly, no such process is contemplated by any applicable statutes or cases. Yet with all respect we urge that this is precisely the kind of corporate melee into which the parties can be projected by the District Judge's decision below.

POINT II

Contrary to the District Court's opinion Messrs. Malone and Markley were not "unavailable" and the very position taken by Liquifin in its motion demonstrated a violation by it of the proxy rules.

In determining that Liquifin did not violate the proxy rules and that Messrs. Malone and Markley were truly "unavailable" to serve in the positions to which they were duly elected by the shareholders of Ronson, Judge Tenney stated (215a):

> "Ronson claims that, in its proxy statement, Liquifin represented that all of its proxies would be voted for all of its candidates. In fact, however, Liquifin merely promised that 'the proxies solicited by Liquifin will be voted for all of Liquifin's candidates.' Its July 5th instructions are entirely consistent with that pledge. Additionally, Ronson asserts that the reservation now expressed by Messrs. Malone and Markley--that they do not wish to serve on a board on which they would be in the minority—was never disclosed to the stockholders but that Liquifin represented in its proxy statement that each of the candidates would serve as a director

> if elected. What Ronson fails to add is that Liquifin *also* stated that 'in the event that any [of its nominees] shall be unavailable to serve, the persons named as proxy agents will vote their proxies for other candidates who shall be designated by Liquifin.' Thus, all shareholders were advised that it was possible that some of Liquifin's nominees might be unavailable—for whatever reason—and that, in such event, Liquifin would have complete control over designating their replacements."

We respectfully submit that Judge Tenney erred in so concluding.

Liquifin's proxy statement represented unequivocally, however, that each of its nominees had "consented to serve as a director if elected. . . ." (125a and that "Liquifin does not contemplate that any of the candidates will be unavailable for election as a director" (125a). It was at all times foreseeable that the management slate might prevail in the election, and that the two Liquifin candidates elected to the two "vacant" seats would thus be in a minority position. The reservation expressed by Messrs. Malone and Markley that they prefer not to sit on a management-controlled board was never disclosed to the stockholders.

We submit that shareholders of Ronson were entitled to be informed of such hidden reservations at the time they were asked to vote for the Liquifin slate. We are aware of no other case where a court has permitted a party to solicit proxies for certain individuals who are only willing to serve on conditions not stated to the shareholders whose votes such party is soliciting.

Moreover, the District Court's concept of "availability" or "unavailability", was clearly incorrect. Ronson recognizes that Liquifin's Proxy Statement contained the boiler plate language that "in the event that any [of its nominees]

shall be unavailable to serve, the persons named as proxy agents will vote their proxies for other candidates who shall be designated by Liquifin" (230a). This is only a starting point for analysis. For the foregoing language to come into play there must still be an actual showing of unavailability. What exists here is merely an expressed *preference* by Markley and Mal[illegible] not to serve on a management-controlled board. This hardly constitutes "unavailability."

Liquifin concedes that both would have been available had Liquifin won the proxy contest for control of Ronson. It is plain that even now both individuals are able to take a seat on the board. There is no suggestion that they are in ill health or that their occupations create any impediment to their presence at board meetings. Both have stated that they *will* serve if Marfuggi and Zoeller are not seated (228a). How can this be construed as unavailability? Judge Tenney's ruling was in error.

Finally, we note that Liquifin offered no evidence of irreparable harm in the event its application was denied. This is not surprising. It could hardly claim irreparable harm in this case, since, if its application would have been denied, the result would simply have been that two of its *own* nominees would have become Ronson directors.

POINT III

Contrary to the District Court's opinion, Ronson will be prejudiced by the substitution of Messrs. Malone and Markley, and especially by the seating of Mr. Zoeller in light of the conflicting fiduciary duties he owes and would owe Liquifin and Ronson.

The District Court, in granting Liquifin the relief it requested, found that Ronson would not be harmed by the substitution of Messrs. Zoeller and Marfuggi for Messrs. Malone and Markley. Judge Tenney stated that (214a):

> "Management will not be prejudiced if Liquifin obtains the relief which it requests; it has succeeded in obtaining the election of its entire slate and its seven-man majority will remain undisturbed."

We submit that Ronson will be harmed by the seating of Mr. Zoeller because Liquifin's candidate Zoeller cannot serve on the Ronson Board without violating the canons of legal ethics or breaching his fiduciary responsibilities to Ronson. Zoeller's presence on the Board would constitute an insoluble conflict of interest and would carry with it an appearance of high impropriety.

At the present time Mr. Zoeller is the principal litigating attorney for the law firm representing Liquifin in this action.* Liquifin has counterclaimed against Ronson and

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* Mr. Zoeller's law firm is counsel of record in the following litigation:

(1) RONSON CORPORATION, Plaintiff, against LIQUIFIN AKTIENGESELLSCHAFT, LIQUIGAS, S.p.A., KUHN, LOEB & Co., D. F. KING & Co., INC., FRANKLIN NATIONAL BANK, FRANKLIN NEW YORK CORPORATION, SERVIZIO ITALIA OF BANCA NAZIONALE DEL LAVORO, PHILIP MARFUGGI, RAFFAELE URSINI and MICHELE SINDONA, Defendants (U.S.D.C., D.N.J., Civ. No. 785-73).

the seven Ronson management directors elected to Ronson's Board of Directors in June of 1974 (48a). As the principal litigating attorney for Liquifin Mr. Zoeller, or a member of his firm, will presumably be taking depositions during pre-trial discovery and conducting examination or cross-examination of these directors at trial. It is difficult to conceive of a method better calculated to disrupt and chill deliberations of Ronson's Board of Directors than to have Liquifin's chief litigating attorney present at the meetings of the Board of Directors.

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(2) RONSON CORPORATION, Plaintiff, against LIQUIFIN AKTIENGESELLSCHAFT, and LIQUIGAS, S.p.A., and VINCENZO CAZZANIGA, Defendants (U.S.D.C., S.D.N.Y., 73 Civ. 4026 (C.L.B.)).

(3) LIQUIFIN AKTIENGESELLSCHAFT, a Liechtenstein corporation, Plaintiff, against RONSON CORPORATION, a New Jersey Corporation, and LOUIS V. ARONSON II, Defendants (U.S.D.C., D. of C., Civil Action No. 1097-73). Transferred to U.S.D.C. for the District of New Jersey.

(4) RONSON CORPORATION v. LIQUIFIN A.G. *et al.* (U.S.D.C., S.D.N.Y., 74 Civ. 2488 (CHT)).

It should also be noted that Mr. Zoeller's client Liquifin, and its parent company Liquigas, is involved in litigation relating to the subject of this action in Italy:

DOTT. DAVIDE VISMARA, Attore, contro LIQUIGAS, S.p.A., Convenuta (Court of Milan Session 8—Civil No. 7157/73 (G.I. dott. Urbano)).

Additionally, there are two related administrative proceedings relating to this action in progress and which are being contested by Ronson:

RONSON CORPORATION and RONSON HELICOPTERS, INC., ACQUISITION OF CONTROL BY LIQUIGAS, S.p.A., ET AL. (Civil Aeronautics Board—Dockets 25583, 25603).

In Re APPLICATIONS OF THE FIRST NATIONAL BANK OF WASHINGTON (Federal Communications Commission—File Nos. 193-A-TC-14 and 21997-1B-I-TC-14).

As its attorney in this action Mr. Zoeller owes to Liquifin his undivided loyalty to represent its interests to the exclusion of all competing interests. As "director" of Ronson he would owe Ronson his undivided loyalty. Clearly these two duties are in sharp conflict while Mr. Zoeller and his firm are representing Liquifin in an action against Ronson and seven of its directors (48a).

Canon 5 of the American Bar Association's Code of Professional Responsibility states that "A lawyer should exercise independent professional judgment on behalf of a client." Ethical Consideration 5-1 of Canon 5 provides that

> "The professional judgment of a lawyer should be exercised within the bounds of the law, *solely* for the benefit of this client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor desires of third persons should be permitted to dilute his loyalty to his client." (Emphasis added).

As a director of Ronson Mr. Zoeller would be under an affirmative duty, imposed by law, to act in the best interests of the corporation. New Jersey law, which determines a director's fiduciary duties to a corporation in this instance, "has characterized the directors of a corporation as fiduciaries and has demanded the utmost fidelity in their dealings with the corporation and its stockholders." *Daloisio* v. *Peninsula Land Company,* 43 N. J. Super. 79 (App. Div. 1956) (citing *Hill Dredging Corp.* v. *Risley,* 18 N. J. 501 [1955]; *Eliasberg* v. *Standard Oil Company,* 23 N. J. Super 431 [Ch. Div. 1952]; *Whitfield* v. *Kern,* 122 N. J. Eq. 332 [E. & A. 1937]).

It is impossible for Mr. Zoeller to discharge these two extremely important and directly conflicting duties while his firm represents Liquifin. Mr. Zoeller will, as a director,

undoubtedly come into possession of confidential material with reference to the pending litigation while his firm represents Liquifin. Indeed such litigation must be a principal topic discussed at directors' meetings. As Liquifin's attorney, Mr. Zoeller would violate the Canons by withholding this type of information from Liquifin; yet, if he does not keep such information confidential, he breaches his fiduciary duty to Ronson. Clearly Mr. Zoeller is attempting to serve two masters and, at that, two masters who have been and continue to be in mortal combat. It will be impossible for him to do so without violating his fiduciary duties to one or both of the two masters, to the clear detriment of other Ronson shareholders.

Very recently, in *General Motors* v. *The City of New York,* Nos. 73-2351; 73-2585 (2nd Cir. June 28, 1974), this Court stated that "scrupulous care" must be taken "to avoid any appearance of impropriety lest it taint both the public and private segments of the legal profession." (p. 4544). See also, Canon 9 of the Code of Professional Responsibility which states that "[a] lawyer should avoid even the appearance of professional impropriety." What constitutes the appearance of impropriety is, as this Court said in *General Motors, supra,* "largely a question of current ethical-legal mores." (p. 4543).

If Mr. Zoeller were to occupy the two conflicting fiduciary positions, at the very least there would be an appearance of impropriety that could not be removed or purged, and must be prevented, not merely to protect the interests of Ronson, but also to protect the public interest and the integrity of the bar.

Although there appears to be no case law or American Bar Association Opinions directly on point, there are a number of analogous cases and principles that should be

examined at this point. In *Marco* v. *Dulles*, 169 F. Supp. 622 (S.D.N.Y. 1959), app. dismissed 268 F.2d 192 (2nd Cir. 1959), the court, commenting the ability of an attorney, who had also been a director of a corporation, to separate the dual obligations, stated (p. 631):

> "his acts as a director cannot be separated from his acts as a member of the firm who were general counsel for the corporation. The line between the two is entirely too fine to permit the professional obligation as a lawyer and the fiduciary obligation as a director to be placed in convenient separate boxes."

Although counsel was not disqualified in *Marco, supra* because of special and unusual circumstances, it is submitted that the above statement is equally applicable in the situation where a director is also the attorney for a minority stockholder involved in litigation with the corporation. Applying the above to the instant factual situation it is submitted that no matter how earnest he may be in attempting to carry out his dual obligations, Mr. Zoeller will not be able to separate his actions as a director and as an attorney in such a manner that the two obligations do not conflict. They cannot be placed in "convenient separate boxes".

In *Estates Theatres Inc.* v. *Columbia Pictures Industries, Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972) the court in requiring an attorney to withdraw from the case, stated that, (p. 99)

> "A lawyer should not be permitted to put himself in a position where, even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another."

Although not directly speaking to the issue in the present action, it is submitted that what the *Estates Theatres* case

is attempting to prevent is situations where an attorney, acting in a fiduciary capacity for two distinct clients or entities, might embroil himself in a conflict of interests and be incapable, because of the circumstances, from adequately serving or representing one *or both* of the parties to whom he owes such fiduciary duties.

In Formal Opinion 10 the Committee on Professional Ethics of the Amercian Bar Association found that a salaried officer of a trust company could not represent the company as an attorney for an estate of which it was trustee.

> "As an employee his only duty is to his employer. As a lawyer he owes a duty to the court and to the public, as well as to this client. Can he consistently act in these dual capacities at one and the same time?"

As a director Mr. Zoeller would owe a duty to Ronson and its shareholders in general. As attorney for Liquifin he would owe a duty to Liquifin. We ask the same question as did the Committee in the case above "Can he [Zoeller] consistently act in these dual capacities at one and the same time?"

Mr. Zoeller, if he is allowed to become a director of Ronson and if his firm remains counsel to Liquifin, will be placing himself in the precarious position of breaching confidences placed in him by Liquifin or Ronson or both. The Court in *Richardson* v. *Hamilton International Corporation,* 469 F.2d 1382 (3rd Cir. 1972) spoke to this problem when it held that an attorney, formerly associated with a law firm that represented the corporation against whom he had brought a derivative action, could not represent the class in the action. The court said that (p. 1385):

> "While we do not doubt that Mr. Richardson acted in good faith and had the best interests of his class

> at heart when he brought this suit, we do not believe that he should be permitted to place himself in a position where, even unconsciously, he will be tempted, or it appears to the public and his former clients that he might be tempted, in the interests of his new client, to take advantage of information derived from confidences placed in him by Hamilton Life and its officials."

It must be continually remembered that the Code of Profesional Responsibility, as well as the law respecting fiduciary duties, sets high moral and ethical standards. If the profession of law is to retain respect, attorneys must, either by their own actions or by the actions of the courts, refrain from conflicts of interests or conduct that has the appearance of impropriety. We submit that contrary to the District Court's opinion Ronson will be prejudiced if Mr. Zoeller is allowed to become a director. We further submit that Mr. Zoeller's attempt to serve as a director of Ronson and as the litigating attorney for Ronson's adversaries has a distinct appearance of impropriety.

Contrary to Judge Tenney's conclusion, the seating of Mr. Zoeller and Oreste Marfuggi as directors of Ronson is not a matter of indifference to Ronson. Oreste Marfuggi is the brother of Philip Marfuggi, the president of Ronson's adversary, Liquigas. The connection of Mr. Zoeller to Liquifin and the connection of Oreste Marfuggi to Liquifin differ not merely in degree but in kind from that of Messers. Malone and Markley, both of whom are serving as officers of U. S. companies not beholden to the Liquifin-Liquigas interests.

Judge Tenney in the opinion below recognized prejudice to only two stockholders, Mr. and Mrs. Hamblen, who voted the extra 138 shares for Malone and Markley. The Court states (215a):

> "The only Ronson stockholders who could conceivably be prejudiced by the substitution of Marfuggi and Zoeller for Malone and Markley—the Hamblens —have not raised any objection."

With all respect this is unfair and unrealistic. The first assertion of Liquifin's motion to change its ballot was in the oral argument before Judge Tenney on July 9th (198a). Of course, the Hamblens had not been notified of the hearing before Judge Tenney and were never given an opportunity to assert a position on Liquifin's motion. More serious, the Court erroneously assumed that only the Hamblens are affected by the result imposed below. The reality is that had other Ronson stockholders been fully apprised of the change of position by Liquifin, such stockholders might have changed the 2,255,525 votes cast by them in such a manner as to preclude the election of Messrs. Zoeller and Marfuggi—a result which clearly lay within their power had they been given appropriate information and the same opportunity as Liquifin.

This result, we suggest, is a denial of due process to the shareholders immediately affected, namely the Hamblens and the other shareholders who had no notice of Liquifin's application, *Mulane* v. *Central Hanover Trust Co.,* 339 U.S. 306 (1950); *Schroeder* v. *City of New York,* 371 U.S. 208 (1962); *Valezquez* v. *Thompson,* 451 F.2d 202 (2d Circ. 1971). It was also a deprivation of a property right of shareholders (i.e., the right to vote shares) without due process of law. 5 *Fletcher Cyclopedia Corporations* §205 at 127 *et seq.* (perm. ed. 1967); *Faunce* v. *Boost Co.,* 15 N.J. Super 534, 83 A.2d 649 (1951); *Brown* v. *McLanahan,* 148 F.2d 703 (4th Cir. 1945); *DuVall* v. *Moore,* 276 F. Supp. 674 (N.D. Iowa 1967).

In addition, a procedural pre-requisite to judicial review of any election by shareholders under New Jersey law is a determination "upon notice to the persons elected, the corporation and such other persons as the Court may direct," N.J.R.S. 14A: 5-27. In the circumstances of this case such notice would clearly include the Hamblens and the other stockholders who are being deprived of the effect of their vote.

Conclusion

For the foregoing reasons the order of the District Court, granting injunctive relief to defendant-appellee should be reversed.

Respectfully submitted,

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Due and timely service of three (3) copies of

the within Brief is hereby admitted this

20th day of Sept, 1974

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Attorney for

4:30 P.M.

Mudge Rose Guthrie & Alexander AM

Attys for Liguori,

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